

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

September 2, 1997

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket Nos. YORK 97-17-M
	:	YORK 97-25-M
TRESCA BROTHERS	:	
SAND & GRAVEL, INC.	:	

BEFORE: Jordan, Chairman; Marks, Riley, and Verheggen, Commissioners

ORDER

BY THE COMMISSION:

These civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1994). On May 19 and June 19, 1997, Chief Administrative Law Judge Paul Merlin issued Orders of Default to Tresca Brothers Sand & Gravel, Inc. (ATresca@) for its failure to answer the Secretary of Labor=s petitions for assessment of civil penalty or the judge=s Orders to Respondent to Show Cause. The judge assessed civil penalties of \$2854 and \$2290 in the two cases.

On July 1, 1997, the Secretary filed a Motion for Approval of Settlement in each of these cases with the Commission=s Office of Administrative Law Judges. Each motion seeks approval of a settlement involving payment by Tresca of a substantially reduced penalty based upon attached additional information received from the district office of the Department of Labor=s Mine Safety and Health Administration (AMSHA@) indicating that the underlying citations have been vacated or modified to reduce the proposed penalty. Each motion also states that Approval of this settlement is in the public interest and will further the intent and purpose of the Federal Mine Safety and Health Act of 1977.@ Mot. at 2. Both motions fail to mention the default order issued in each case.

The judge=s jurisdiction over these cases terminated when his default orders were issued on May 19 and June 19, 1997, respectively. 29 C.F.R. ' 2700.69(b) (1995). Relief from a judge=s decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. ' 823(d)(2); 29 C.F.R. ' 2700.70(a). If the Commission does not direct review within 40 days of a decision=s issuance, it becomes a final decision of the Commission. 30

U.S.C. § 823(d)(1). The Secretary's settlement motions were received by the Commission on July 3 and July 7, 1997, respectively.<sup>1</sup>

Relief from a final Commission judgment or order is available to a party under Fed. R. Civ. P. 60(b)(1) in circumstances such as mistake, inadvertence, or excusable neglect. 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure apply "so far as practicable" in the absence of applicable Commission rules); e.g., *Lloyd Logging, Inc.*, 13 FMSHRC 781, 782 (May 1991). We are unable to evaluate the merits of the Secretary's position on the basis of the present record. In the interest of justice, we reopen the proceedings, treat the Secretary's settlement motions as petitions for discretionary review requesting relief from final Commission decisions, and excuse the late filing in No. YORK 97-17-M. See, e.g., *DCL Constr., Inc.*, No. WEST 95-189-M, Unpublished Order at 2 (May 9, 1996); *Transit Mixed Concrete Co.*, 13 FMSHRC 175, 176 (February 1991).

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<sup>1</sup> The settlement motion in No. YORK 97-17-M was received on July 3, several days after the default order in that case had become a final decision of the Commission on June 30, 1997. The settlement motion in No. YORK 97-25-M was received on July 7; the default order in that case became a final order of the Commission on July 29, 1997.

We remand the matter to the judge, who shall determine whether final relief from default is warranted. *See Hickory Coal Co.*, 12 FMSHRC 1201, 1202 (June 1990).

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Mary Lu Jordan, Chairman

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Marc Lincoln Marks, Commissioner

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James C. Riley, Commissioner

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Theodore F. Verheggen, Commissioner